UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re: AUTOMOTIVE PARTS ANTITRUST LITIGATION	12-md-02311 Honorable Marianne O. Battani
In Re: All Auto Parts Cases	
THIS DOCUMENT RELATES TO: ALL AUTO PARTS CASES	2:12-MD-02311-MOB-MKM

REPLY IN SUPPORT OF CERTAIN DEFENDANTS' OBJECTIONS TO, AND MOTION TO MODIFY, MASTER ESSHAKI'S JUNE 18, 2015 ORDER

PRELIMINARY STATEMENT

The justifications for undersigned Defendants' Objections to Master Esshaki's June 18, 2015 Order have become even more pronounced during the last few weeks. Another parts case – the 31st set of putative class actions to join this litigation – has been filed. EPPs have newly identified an additional 32 cars that they purchased or leased during the lengthy proposed class periods. At least 139 cars are now at issue—more than two per EPP (with some EPPs asserting claims for as many as ten cars). Deficiencies in the EPP and ADP productions continue to leave sizeable gaps with respect to basic information about Plaintiffs' car purchases and sales.

Despite that this sprawling MDL and the problems endemic to coordinating 31 distinct parts cases continue to grow, Plaintiffs adhere to the view that nothing has changed since the Judicial Panel of Multidistrict Litigation consolidated a group of cases involving only Wire Harness Systems before this Court. By the logic of Plaintiffs' arguments and the limitations imposed by Master Esshaki's Order, all Defendants will be limited to the same, single fact witness deposition of each named plaintiff no matter how large or complicated this litigation becomes. The potential prejudice caused by these discovery restrictions threatens to deny Defendants' rights to adequately defend themselves in these cases and is an abuse of discretion.

Simply put, this massive – and growing – litigation cannot be treated for discovery purposes as if it were a single case against a single defendant group alleging a single conspiracy. The limitations on the depositions of the named plaintiffs would be unduly restrictive for a single putative class action, and completely ignore the realities and scale of these much more expansive actions. At this point, 58 EPPs and 47 ADPs have filed 31 separate and distinct sets of class actions against more than 50 largely non-overlapping Defendants. This Court has taken on the unprecedented task of overseeing the equivalent of 31 distinct MDLs, in each of which, under normal circumstances, the named plaintiffs would be separately deposed. Defendants do not ask

for anything near that. Instead, they have made extraordinarily modest requests: that each EPP sit one time for up to a two-day deposition (for all purposes in all of these many cases) and that the depositions of ADPs be conducted in accordance with what Master Esshaki previously decided was appropriate and necessary for the Wire Harness action alone.

The EPPs and ADPs chose to structure this litigation with nearly completely overlapping named plaintiffs across 31 separate cases. This choice does nothing to mitigate the complexity and variety of these cases. Defendants need – and are entitled to – an adequate opportunity to depose the named plaintiffs as to the particular circumstances and issues of their particular cases—factors that the Objection extensively details but Plaintiffs largely ignore in their responses. Defendants respectfully request that the Court enter their Proposed Order to provide an adequate number of depositions and to remove other unnecessary restrictions.

ARGUMENT

I. Plaintiffs' Responses Proceed from Four Incorrect Premises

A. False premise: What may be adequate for one case is adequate for 31 separate cases.

Plaintiffs' justification for the deposition limits in Master Esshaki's Order is premised on the mistaken notion that 31 separate parts cases are, in effect, a single case. They ignore that each is a distinct group of putative class actions in which Plaintiffs allege separate conspiracies as to distinct products made by largely non-overlapping Defendants and sold under varied conditions to different subsets of OEMs. *See* Objection at Sec. I.B. Despite these meaningful differences, Plaintiffs contend that the parameters of EPP and ADP depositions should not take into account the number or variety of the cases that have become part of this complex litigation. The same erroneous premise underlies Master Esshaki's Order, which permits *fewer* and *shorter* depositions of named plaintiffs for 31 distinct parts cases (and growing) than he previously recommended for just the Wire Harness case alone. *See* Objection at Sec. I.A.

Plaintiffs offer no reason for this topsy-turvy result other than that this case concerns "consumers who bought automobile(s)." EPP Response at 4; *see also* ADP Response at 3-4 (noting that depositions will focus on the fact that ADPs "purchased a car, not specific parts"). Plaintiffs' reliance on this truism fails to address Defendants' extensive briefing on the meaningful case-specific and Defendant-specific issues that will arise during the ADP and EPP depositions. For example, in light of the fact that different parts actions (and even different complaints within a single parts action) allege claims for purchases of different makes of cars, Defendants may have diverging interests concerning which ADP witness to depose, and what questions to ask of an ADP or EPP witness, during their limited depositions. *See* Objection at Sec. II.B. Similarly, questions about particular parts – including some that were options or upgrades – will be relevant to understanding the pricing and negotiation dynamics of EPPs' car purchases. *See* Objection at Sec. I.B. Defendants' requested modifications to Master Esshaki's Order would permit Defendants the minimum opportunity required to adequately cover these topics, which Plaintiffs do not dispute are relevant.[1]

B. False premise: Plaintiffs bear no responsibility for the large volume of discovery.

If Defendants seek what Plaintiffs attempt to portray as an excessive number of depositions, then that is of Plaintiffs' making, not Defendants'. Plaintiffs are not involuntary participants in this litigation. They each chose to be named in more than 31 separate and distinct class actions alleging nearly 40 different state law claims against 50 Defendants.

[1] Plaintiffs' suggestion that Defendants' concerns are served by the right to seek additional deposition time "with cause" is simply unworkable given the likelihood that – due to inadequate productions from Plaintiffs and the growing number of car transactions at issue – it would be necessary with respect to most Plaintiffs. Moreover, Plaintiffs' suggestion that sophisticated defense counsel would "abuse" or "harass" them with questions about which they "have no knowledge" is baseless. Defense counsel will seek only relevant discovery in accordance with the Federal Rules, and will do so in a professional manner consistent with attorney conduct rules.

The ADPs are far from being small mom-and-pop businesses incapable of understanding the consequences of bringing these lawsuits. *See* Objection at Sec. I.E. At least eleven ADPs have been named plaintiffs in another antitrust class action. Similarly, at least ten of the EPPs have been named plaintiffs in complex class actions, including antitrust cases.[2] Asking each EPP to sit for up to 14 hours of deposition for all purposes by all 50 Defendants in all of the 31 separate sets of cases is not at all unreasonable, especially since most EPPs have to be questioned about more than one car. Moreover, all named plaintiffs stand to get *separate* incentive payments in *each* of the 31 cases.[3]

The use of Plaintiffs involved in multiple car purchases necessarily requires more deposition time. An ever increasing number of EPPs will need to be questioned about more than one car (at last count, 41 out of 58 EPPs assert claims for more than one car during the lengthy class periods).[4] The need for more time is even more evident as to ADPs—many of which need to be questioned about multiple OEM brands at several locations, all of which will be central to the defense of both the ADPs' and EPPs' cases. *See* Objection at Sec. I.E.

C. False premise: The testimony of each individual Plaintiff is not meaningful.

Plaintiffs appear to believe that any deficiencies in the discovery of individual named plaintiffs – which are extensive as to both ADPs and EPPs – are of no moment.[5] *See* ADP

[2] These cases include antitrust litigations concerning packaged ice, fresh milk, lithium batteries, vehicle carrier services, dynamic random-access memory, and auction houses.

[3] *See, e.g.*, End-Payor Plaintiffs' Motion for Preliminary Approval of Proposed Settlement with Yazaki Defendants, No. 12-cv-103, ECF No. 222-2, Ex. A at ¶ 29(a) (E.D. Mich. Sept. 22, 2014) (Settlement Agreement reserves Plaintiffs' right to submit an application for "reimbursement of expenses and costs incurred in connection with prosecuting the Action and incentive awards").

[4] On June 26, 2015, sixteen of the EPPs identified 32 new vehicles that they purchased or leased.

[5] In an attempt to exaggerate the effect of Defendants' request, Plaintiffs repeatedly sum up the total hours of depositions or number of documents produced across their entire plaintiff groups.

Response at 19 ("Surely, through these ninety depositions [of ADPs], Defendants will be able to ascertain all the information they require about a given OEM . . . ."). Plaintiffs apparently believe that, for example, testimony from one ADP as to its Honda purchases and sales would eliminate the need to ask any other ADP about its purchases and sales of Hondas. This is flatly incorrect. ADPs ostensibly represent the interests of all dealers of all cars sold or leased during the class period. The same is true of EPPs for the cars they bought or leased. It is critical that Defendants have adequate time to examine each Plaintiff as to their transactions (including both purchases and sales). To the extent that a named plaintiff that was located or purchased cars in a given state is found to be an inadequate representative of their purported class for any of many possible reasons, all claims under that state's laws would be vulnerable. Similarly, if a named plaintiff has not been injured by the alleged conduct, that plaintiff would lack standing to bring claims for the car models that plaintiff purchased or leased. Also, individual transactions by every one of the named plaintiffs will be highly relevant to whether there is such diversity in the ADPs' and EPPs' transactions that classwide impact or injury cannot be established using common proof, thus making class certification inappropriate.[6]

Moreover, Plaintiffs appear to view discovery by deposition and by documents (or even by letters from counsel) as interchangeable, as if one replaces the need for the other. *See* ADP Response at 16, 23 (supposed forthcoming production "should more than cover the information Defendants state they need"); *see also* EPP Response at 4-5, 7 ("Given that Defendants already

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This is completely beside the point. The issue is not the discovery of dozens of unrelated named plaintiffs on a combined basis, but rather the discovery as to each individual named plaintiff.

[6] *See In re Polyurethane Foam Antitrust Litig.*, No. 1:10-MD-2196, 2014 WL 6461355, at *25 (N.D. Ohio Nov. 17, 2014) ("[T]he impact burden requires a method of proof, using evidence common to the class, that can establish that all or nearly all class members incurred an antitrust overcharge of some amount."); *see also id.* at *44 ("[I]f damages are not susceptible to computation using a 'mathematical or formulaic' calculation, class treatment may be inappropriate.") (quoting *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 307 (5th Cir. 2003).

possess [EPPs' documents] … [t]here is no logical explanation for the need to take 14 hours [of deposition]"). There is no basis for Plaintiffs' approach in the Federal Rules or federal common law, both of which protect the rights of parties to have full access to both deposition and document discovery.[7] *See* Objection at Sec. V.

D. False premise: Multiple factors that affect and determine net price are not relevant.

The ADPs' response is largely premised on the extraordinary position – not even raised by EPPs – that "terms that were not the actual price of a vehicle are not relevant" and "do not bear on the calculation of damages on a particular overpriced product."[8] *See* ADP Response at 15. With this flatly incorrect *ipse dixit,* ADPs seek to foreclose discovery on issues that are patently relevant to injury and damages.[9] Terms involving financing, promotions, floor plan assistance, and warranties, for example, all go directly to explaining *how* the price for a car was reached and *what* net price the ADPs received (and EPPs paid) for the complete product package. These issues are plainly relevant to determining whether plaintiffs were injured, the

[7] Even if this trade-off were appropriate, significant deficiencies in Plaintiffs' productions – for example, one-third of EPPs' car purchases are undocumented – mean that depositions will be the *only means* for obtaining discovery on basic key issues about named plaintiffs' car transactions.

[8] ADPs cannot seriously contest the relevance of these items while joining a subpoena of OEMs that requests the same information. *See* Special Master's Order Regarding Direct Purchaser Plaintiffs' Motion to Limit Uniform Subpoena to OEMs, No. 2:12-md-2311, ECF No. 992 (E.D. Mich. June 4, 2015) (Requests No. 1 and 4 seeking pricing "net" of "incentives" or "allowances," including rebates, refunds, discounts, financing terms, and trade-ins). ADPs are also is at odds with EPPs, who supported discovery of direct purchaser plaintiffs about "financing of new vehicles," and argued that "[o]bjecting to these requests on relevance grounds is preposterous." *See* Indirect Purchaser Plaintiffs' Response in Opposition to Direct Purchaser Plaintiffs' Motion To Limit Uniform Subpoena to OEMs and to Ford's Response to the Proposed OEM Subpoena, No. 2:12-md-2311, ECF No. 979 (E.D. Mich. May 27, 2015).

[9] Plaintiffs provide no context for their misleading reliance on discovery rulings by Master Esshaki in the Wire Harness case, which did not address financing of car *sales* by ADPs or even OEM financing of ADPs' purchases of individual cars *at all*. Moreover, Defendants not named in the Wire Harness case were not involved in any of its discovery or related disputes.

extent of pass-on of any injury, and the existence and extent of their damages, as well as whether classwide proof can be used to establish all of these elements.[10]

II. Plaintiffs Do Not Dispute That the Requirement for Deposition Topics and Restriction on the Number of Defense Counsel Questioning a Witness are Unprecedented

Plaintiffs do not dispute that there is no precedent in antitrust MDLs for limiting the number of counsel who can ask questions at a deposition and requiring Defendants to provide topics in advance of a Rule 30(b)(1) deposition. Their main argument is that the Federal Rules do not prohibit these requirements. That does not justify burdening Defendants with these improper conditions, which even Plaintiffs did not initially ask for. In addition, limiting the number of defense counsel who can ask questions risks creating meaningful conflicts among Defendants about which witnesses to call and what questions to ask. *See* Objection at Sec. III.

III. Master Esshaki Abused His Discretion in Substantially Infringing Defendants' Rights to Defend Themselves and Potentially Denying Their Due Process Rights

The potential prejudice that could result from leaving Master Esshaki's Order intact is significant and could have a lasting impact on the outcome and integrity of this litigation. The restrictions and limitations will cut off Defendants' access to critical discovery and create unresolvable conflicts of interest among them, with a real potential to impair Defendants' fundamental due process protections and violate principles of open discovery provided by the Federal Rules and longstanding federal common law. *See* Objection at Sec. V.

CONCLUSION

For the foregoing reasons, the undersigned Defendants respectfully request that the Court enter their Proposed Order Modifying Master Esshaki's June 18, 2015 Order.

[10] The unique and complex nature of car transactions – including trade-ins, financing, options, individualized negotiations, extended warranties, and many other factors in the net price – render inapposite the cases on damages upon which Plaintiffs rely.

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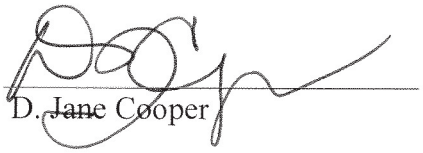
CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2015, I, D. Jane Cooper, electronically caused to be filed the foregoing Reply in Support of Certain Defendants' Objections to, and Motion to Modify, Master Esshaki's June 18, 2015 Order with the Clerk of the Court using the ECF system which will send notification of such filing to the ECF participants.

Dated: July 6, 2015

By: 
D. Jane Cooper